No. 2838

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington,

Plaintiff in Error,

vs.

W. H. PARSONS and JANE DOE PARSONS, his wife; FALCON JOSLIN and JANE DOE JOSLIN, his wife; JOHN SCHRAM and JANE DOE SCHRAM, his wife; E. L. WEBSTER and JANE DOE WEBSTER, his wife; J. W. CLISE and JANE DOE CLISE, his wife; F. E. BARBOUR and JANE DOE BARBOUR, his wife, and WASHINGTON SECURITIES COMPANY, a corporation,

Defendants in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Brief of Defendants in Error

CLISE & POE and
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This is an action at law brought by the plaintiff, appellant here, as receiver of the Washington-Alaska Bank, a corporation of the State of Washington, against all of its stockholders (who include all its officers and trustees) to recover damages

under section seven of the act of Congress known as the "Sherman act." It is alleged that the bank suffered these damages by reason of its having entered into a conspiracy with certain other banks in Fairbanks, Alaska, where it was doing business. These other banks were First National Bank of Fairbanks and the Fairbanks Banking Company, the latter being originally a partnership and afterwards incorporated under the laws of Nevada.

It is further alleged that the plaintiff's bank, i.e., the Washington bank, became a party to this conspiracy, by the concerted action of all its stockholders. It is claimed by the plaintiff that the Washington bank, having suffered damage by this conspiracy, to which it was a party through the action of all its stockholders, has a right of action against its stockholders for such damage, and that the plaintiff, as its receiver, has succeeded to that right of action. The defendants demurred to the complaint and the district court sustained the demurrer on the grounds that (a) the complaint did not state a cause of action; and (b) the action was not brought within the time limited by law. This appeal is from the judgment of the district court sustaining the demurrer and dismissing the action.

The essential allegations of the complaint, briefly summarized, are as follows:

THE COMPLAINT.

(We shall call, for the sake of brevity, the Washington-Alaska Bank, of which the plaintiff is the receiver, the "Washington Bank," the First National Bank of Fairbanks, the "First National," and the Fairbanks Banking Company, the "Nevada Bank.")

That the Washington Bank was organized under the laws of the State of Washington and entered upon the business of banking at Fairbanks in the year 1905. The First National and a copartnership composed of Barnett, Hill and Wood, known as the Fairbanks Banking Company, were also there engaged in the banking business. Subsequently, in 1908, the above copartnership, was incorporated under the laws of Nevada (Pars. 1, 2, 3, 4, 5, 6 of the Complaint; Trans. pp. 3, 4, 5).

That the defendants, exclusive of the women, are the stockholders and officers of the Washington Bank. That the above banks were all the banks doing business at Fairbanks, or in that vicinity, which is a mining country, and they bought unrefined bullion, loaned money, sold exchange and carried on the usual banking business in a mining country (Pars. 7, 8, 9; Trans. pp. 5, 6, 7).

That in the year 1905 the said three banks "agreed, combined and conspired together to restrain trade and commerce" by conducting their business non-competitively, and in order to effect and secure such non-competitive conduct entered into a certain agreement in writing which is set out in the complaint in full. This agreement bears date June 6, 1905, and fixes the price to be charged for exchange, telegraphic transfers, handling of gold dust, collections, rates of interest, etc. (Par. 10; Trans. pp. 9, 10, 11, 12.)

"That the agreement, combination and conspiracy aforesaid, entered into on the date set forth in said written agreement, was continued up to and including January 4, 1911." In the meantime the banks, parties to the agreement, carried on a large business pursuant to that agreement, and charged and enforced unreasonable, high and excessive charges and rates. (Par. 11; Trans. pp. 12, 13).

That, in order to secure the observance of the above unlawful agreement, each of the parties thereto deposited with the clerk of the district court of the Territory of Alaska the sum of five thousand dollars as the penalty to be forfeited in case of violation. Nevertheless, the directors, officers and stockholders of the Washington Company and the Nevada Company suspected that the First National was secretly violating the agreement and there-

upon, on May 7, 1909, the Nevada Company purchased half of the capital stock of the First National and the Washington Company purchased the other half, in order "to carry out and effectuate the purposes of said unlawful agreement, combination and conspiracy." The Washington Bank and the Nevada Bank each paid $62,500.00 for one-half of the First National stock. Thereupon, the Nevada Company and the stockholders and officers of the Washington Company, "in pursuance of the combination and conspiracy hereinbefore mentioned," compelled it to enter into a further agreement in writing with them of the same general nature as the agreement of June 6, 1905 (Pars. 11, 12, 13; Trans. pp. 12, 13, 14, 15, 16, 17, 18, 19, 20).

That on May 10, 1909, "in pursuance of the conspiracy as hereinbefore set forth," the Washington-Alaska Bank and the Fairbanks Banking Company entered into another illegal agreement in writing, which is set out in full and is supplemental to the agreement last above mentioned of the same date (Par. 14; Trans. pp. 22, 23, 24).

That thereafter, while the directors, stockholders and officers of the Washington Bank and the Nevada Bank were conducting and carrying on the banking business "in pursuance of said unlawful

combination and conspiracy in restraint of trade and commerce," they agreed, "in order to make still more secure and to render permanent the said unlawful restraint of trade and commerce," that the stockholders of the Washington Company should sell to the Nevada Company all the capital stock of the former and all the assets; and that "in pursuance of said combination and restraint of trade and commerce," it was agreed that the Nevada Company should purchase from these defendants, for the sum of $250,000.00, all of the stock of the Washington Bank (Par. 15; Trans. pp. 24, 25, 26), and this sale and transfer was consummated about the 16th of September, 1909 (Par. 16; Trans. pp. 27, 28, 29).

That thereupon the directors of said Washington Company, "in pursuance of said unlawful agreement, combination and conspiracy in restraint of trade and commerce," entered into an agreement in writing with the Nevada Company whereby, in consideration of the purchase by the latter of said shares, the sellers agreed not to engage in the banking business in the vicinity of Fairbanks for a period of five years (Par. 17; Trans. p. 33).

That at the time of the purchase by the Nevada Bank of the shares of the Washington Bank, the

Nevada Bank was insolvent, but the Washington Bank was solvent (Pars. 18, 19; Trans. pp. 33, 34).

That the real value of the shares of the Washington Bank was $140,000.00, and the difference between this amount and the purchase price of $250,000.00 was paid to the defendants as an advance of the future unlawful profits to be made by the Nevada Company "out of the unlawful agreement and combination in restraint of trade and commerce hereinbefore set forth." (Par. 19; Trans. pp. 34, 35).

"That in pursuance of said combination and conspiracy in restraint of trade and commerce," the directors and stockholders of the Washington Bank agreed with the Nevada Bank "to perfect and did perfect the said unlawful combination in restraint of trade and commerce" by causing the directors of the Washington Bank to resign in order that a new board should be selected by the Nevada Bank, which had purchased all the shares. This occurred in January, 1910. Thereafter, and until January 4, 1911, the affairs of the Washington Bank were continued by the new board so selected. On the first day of October, 1910, the Nevada Bank, which then owned and controlled all of the stock of the Washington Bank, took over all the assets of the Washington Bank and thereby consolidated the two institutions, although it is alleged that such consolidation was illegal. "That the said Nevada Company, in pursuance of said unlawful conspiracy and combination in restraint of trade and commerce, hereinbefore set forth, so conducted and operated said Washington Company during all of said times from

September, 1909, until January 4, 1911, in such manner that it dissipated, wasted and converted all the assets of the Washington Bank, leaving its debts unpaid." (Par. 20; Trans. pp. 33, 36.)

That the officers and directors of the Nevada Bank, and the new officers of the Washington Bank (not these defendants) pretended to consolidate the two banks, and there was an actual physical commingling of the assets, and the business was continued as one consolidated or merged corporation, and it was so held out and represented to the creditors and depositors of both banks and to the public generally. That the consolidation was unlawful; that after the consolidation the Nevada Bank, which had taken over the assets of the Washington Bank, changed its name to Washington-Alaska Bank for the purposes of deception. That from September 16, 1909, the Washington Bank and all its assets were absolutely controlled by the Nevada Bank (Par. 21; Trans. p. 37).

That the Nevada Bank continued to carry on the consolidated business until January 4, 1911, when receivers were appointed for it on the ground of insolvency. That the receivers first appointed resigned and this plaintiff was appointed by the district court of Fairbanks, Alaska, receiver of the Nevada Bank, and, as such receiver, took possession of its assets (Par. 22; Trans. p. 38).

That the creditors and depositors and the receiver did not know that the sale of the shares of stock of the Washington Bank was fraudulent nor that the consolidation was fraudulent and void, and the receiver of the Nevada Bank proceeded to administer upon all its assets, including the assets which it had received from the Washington Bank upon the pretended consolidation; that at no time prior to March, 1915, did any creditor, depositor or other person interested in the administration of the assets of the Washington Bank have any notice or knowledge of the existence "of said combination and conspiracy in restraint of trade and commerce as aforesaid." That the plaintiff was appointed in May, 1915, by the Alaska court as receiver of the Washington Bank and has since been appointed receiver theerof by the Superior Court of King County, Washington (Pars. 23, 24; Trans. pp. 40, 41, 42, 43, 44, 45).

That the Washington Bank has unpaid debts in excess of $500,000.00, and no assets. The damages which the Washington Bank has suffered are alleged to be: (a) One hundred ten thousand dollars, being the value of its assets over and above its liabilities at the time the defendant sold their shares of stock; (b) five thousand dollars for the loss of

the use of $62,500.00, which it paid through the instrumentality of the defendants for one-half of the capital stock of the First National; (c) five hundred twelve thousand five hundred fiifty-seven and 17/100 dollars, being the amount necessary to pay its debts.

ARGUMENT.

A.

The Complaint Does Not State a Cause of Action.

1. It must be constantly borne in mind that this action is brought under Section seven of the Act of Congress of July 2, 1890, commonly known as the "Sherman Act." That section is as follows:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

It is conceded that the action is brought under this section. It will be observed also that the jurisdiction of the federal court does not exist unless the damages sued for are shown to have been suffered by a violation of that act. It is not sufficient for the plaintiff to show that he has *a* cause of action which he might maintain in some other forum or in some other form of action. In order to enable the plaintiff to obtain redress in the federal court he must show that his injury has been sustained by reason of the violation of the Sherman act.

Corey vs. Independent Ice Co., 207 Fed. 459.

It is not sufficient, therefore, for the plaintiff to show, if indeed he has, that he has the right, as the receiver of the Washington Bank, in the right of its creditors, to pursue the assets of the Washington Bank which may have been disposed of by its officers and directors in fraud of its creditors or to charge them with the value of the assets dissipated in fraud of creditors.

It might be conceded that the plaintiff would have the right, since the Washington Bank is a Washington corporation, under Section 3697 of Remington & Ballinger's Code of Washington, to sue the trustees for the value of assets disposed of by them.

Tait vs. Pigott, 32 Wash. 344.

Brenman vs. Whitehouse, 85 Wash. 355.

Nor is it sufficient for the plaintiff to show, if indeed he has, that the defendants, notwithstanding the fact of the fully executed sale of their shares of stock to the Nevada Bank, are still the owners of such shares because of the illegality of such sale, and liable upon their superadded liability, under Section 3698 of Remington & Ballinger's Code of Washington, which imposes upon the owners of the shares of stock in banks organized under the laws of the State of Washington substantially the same superadded liability as rests upon shareholders in national banks.

It might be that, under the facts stated in the complaint, the plaintiff could maintain a bill in equity against these defendants and all other persons who were parties to the dissipation of the corporate assets upon the familiar principle that permits a receiver of an insolvent corporation to assert the rights of creditors to pursue the corporate assets which have been disposed of in fraud of their rights and to charge the perpetrators of the fraud with the value of such assets in case they have been dissipated.

But a state of facts which shows the existence of any or all of the above rights and remedies is wholly insufficient to sustain the present action. And, unless this is constantly borne in mind, the discussion wanders from the precise question before the court.

2. This is not a suit to recover damages suffered by stockholders. Nor is it a suit to recover damages suffered by creditors to *their* "business or property." It is an action brought by the receiver in the right of the corporation itself to recover damages by reason of a tort which it is claimed *it* suffered in *its* "business or property." This is conceded by the appellant, whose argument proceeds upon this theory. (See appellant's brief, pp. 10, 20, 59, 61, 125, 127, 138.)

On page 44 of appellant's brief it is stated that "the question lies between the two parties only—the corporation on the one hand and the stockholders on the other." And on page 72 of appellant's brief it is stated: that, "the question is narrowed down so as to lie between the Washington Company and its own stockholders and directors." And by "stockholders," it is conceded, is meant the whole

body of its stockholders. We agree with the appellant on this point. This is correct, for it is clear that no right of action in tort for injury to the "business or property" of the corporation under section seven of the Sherman act exists in the receiver unless it exists in the corporation itself. The mere appointment of the receiver does not create a tort or a right of action where none previously existed. It only vests in the receiver the rights of action which the corporation had. If a cause of action now exists in the receiver it would have existed in the corporation if no receiver had been appointed.

We are not now concerned with the question whether creditors of a corporation injured in its business or property have an action in their own right, under section seven of the Sherman act, which a receiver of such corporation may assert in their behalf. No such claim is made in this case. We shall advert to this question again hereafter.

3. Nor is this an action for damages suffered by the plaintiff's corporation by reason of a conspiracy entered into by third parties and to which it was not a party.

It was itself a party to the alleged unlawful conspiracy by which the plaintiff claims it was injured in its property or business. The pleader, when drafting the complaint, fully appreciated the fact that, in order to state a cause of action under section seven of the Sherman act, he must show, not only damages, but that the damages were suffered by reason of a contract, combination, or conspiracy in restraint of trade or commerce. The complaint alleges with great particularity what this "contract, combination and conspiracy" was. And the pleader takes great care to show that there was but one conspiracy and that all of the acts complained of were but steps in this one continuing combination and conspiracy.

It is now, for the first time, claimed by the appellant that there are three several conspiracies charged in the complaint, and that the plaintiff's corporation was indeed a party to the first two of these conspiracies but not to the third, which was independent of the two first. We are constrained to insist that the complaint be taken as we find it drawn by the pleader, and not as edited by the briefer to meet the present exigency.

It is claimed by appellant that the first 14 paragraphs of the complaint contain nothing but formal

allegations and matters of inducement. Aside from the fact that this is rather a liberal allowance for inducement in a law action, an examination of the complaint shows that if the first 14 paragraphs of the complaint be so treated there will be left no showing whatever of a combination or conspiracy in restraint of trade.

The combination and conspiracy as shown by paragraph X of the complaint was entered into by the First National, Washington Bank, and the Nevada Bank through their respective officers and stockholders in the year 1905. (Trans. p. 8.) It is there alleged that the parties "secretly, unlawfully, and in violation of section three of the act of Congress of July 2, 1890, commonly known and called the 'Sherman Anti-Trust Act,' agreed, combined and conspired together to restrain trade and commerce in the territory of Alaska and between said territory and the several states of the Union and between said territory and foreign nations in this, to-wit: the board of directors, managers and officers of the said three banks then and there secretly agreed together and with one another to conduct their said three several banking businesses non-competitively, and in order to effect and secure such non-competitive conduct thereof, the board of

directors of each of said three banks, by its managing officers, then and there entered into an agreement in the words and figures following, to-wit." And then follows in *haec verba* a written contract between the three banks fixing the charges for exchange, for telegraphic transfers, for handling gold dust, collection charges, interest on loans, etc. (Trans. p. 9.)

Immediately thereafter in paragraph XI of the complaint, (Trans. p. 12) it is alleged *"that the agreement, combination and conspiracy aforesaid entered into on the date set forth in said written agreement was continued up to and including January 4, 1911."* (The italics are ours.) And further "that during all of said time the said schedule of rates and charges set forth in said agreement was unreasonably high and grossly excessive but was notwithstanding substantially observed and enforced by said directors of the said three banks and each of them." It is further alleged that *during all said times* business amounting to many millions of dollars was done "in pursuance of and in compliance with the said agreement to charge, observe and enforce unreasonably high and grossly excessive charges and rates." This is the original and only conspiracy.

It is conceded by the appellant that the Washington Bank was a party to this alleged conspiracy. It is specifically pleaded in the language above quoted from paragraph XI of the complaint that this conspiracy continued up to January 4, 1911, and that the parties thereto operated thereunder up to that time. Now, January 4, 1911, is the date upon which the Nevada Bank went into the hands of a receiver and was long after the Nevada Bank had absorbed all of the assets of the Washington Bank in the manner that the plaintiff complains of. How now can it be claimed that the conspiracy alleged in paragraphs X and XI is but matter of inducement? Moreover, every subsequent step pleaded in the complaint is with great care alleged to be but a step taken in the carrying out of this conspiracy.

In paragraph XIII of the complaint (Trans. p. 14) it is alleged that the Nevada Company and the Washington Company became suspicious that the First National was not abiding by the agreement "and to prevent such variation therefrom and to carry out and effectuate the purposes of said unlawful agreement, combination and conspiracy" bought all the shares of the capital stock of the First National; and that "in pursuance of the combination and conspiracy hereinbefore mentioned"

compelled it to enter into a further agreement in writing which is set out in full. This agreement bears date the 10th day of May, 1909. (Trans. p. 14-20.) In paragraph XIV of the complaint it is alleged that on the same day, i. e., May 10, 1909, that the officers, stockholders and directors of the Washington Bank and the Nevada Bank "did secretly and in pursuance of the conspiracy as hereinbefore set forth further conspire together and entered into an illegal agreement," and the agreement is set out in full.

It is conceded that the Washington Bank was a party to these two last agreements which, as we have shown above, are alleged to have been but parts of the original conspiracy of 1905, which still persisted until 1911.

This brings us to paragraph XV where plaintiff claims is pleaded a wholly independent conspiracy to which the Washington Bank was in no manner a party.

This independent conspiracy, it is claimed, consisted of the sale by the defendants of all of the shares of stock of the Washington Company, to the Nevada Company, and the absorption by the Nevada Company of all the assets of the Washington Company and the subsequent loss thereof.

The pleader well understood that it was essential to connect this transaction with the original conspiracy in restraint of trade in order to show a cause of action under the Sherman act. Consequently it is alleged in paragraph XV "that, while the directors, stockholders and officers of the said Washington Company, defendants herein, and the said Nevada Company, were conducting and carrying on a banking business in pursuance of the said unlawful combination and conspiracy in restraint of trade and commerce" they agreed together, on or about September 13, 1909, *"in order to make still more secure and to render permanent the said unlawful restraint of trade and commerce,* that the stockholders and directors of said Washington Company should sell to the Nevada Company all of the capital stock and all of the assets of the said Washington Company, and that said Nevada Company should purchase from the stockholders and directors of the said Washington Company all said capital stock and assets, and that the said directors, stockholders and officers of said Washington Company should compel the said Washington Company to deliver to the Nevada Company their trust and offices as directors and all the moneys, property and assets, whatsoever of the said Washington Com-

pany;" and "that, in pursuance of said combination and conspiracy in restraint of trade and commerce," the agreement for the sale and purchase of said shares and stock was made and consummated. (Trans. pp. 24, 25, 26, 27, 28. The italics are ours.) Here is a direct, specific and unequivocal allegation that the very things which the plaintiff now claims are of the gist of his action were done while the original conspiracy was still in force to which the Washington Bank was admittedly a party and in order to secure and perpetuate that conspiracy and in pursuance of it.

In paragraph XVII of the complaint it is alleged that "in pursuance of the said unlawful agreement, combination and conspiracy in restraint of trade and commerce, the directors of the Washington Company entered into an agreement in writing with the Nevada Company whereby, in consideration of the purchase by the Nevada Company of their shares of stock they agreed to refrain from engaging in the banking business in the vicinity of Fairbanks for the period of five years. (Trans. pp. 29, 30, 31, 32.) (This agreement of the seller not to compete with the buyer is unquestionally valid. *U. S. vs. Addyston Pipe Co.*, 85 Fed. 281.)

In paragraph XIX of the complaint it is alleged that part of the consideration received by the defendants for their stock was an advance of the future unlawful profits to be made "out of the unlawful agreement and combination in restraint of trade and commerce hereinbefore set forth." (Trans. pp. 34, 35.)

In paragraph XX of the complaint it is alleged "*that in pursuance of said combination and conspiracy in restraint of trade and commerce* and said pretended sale and purchase * * * the directors and stockholders of said Washington Company agreed with the Nevada Company *to perfect and did perfect the said unlawful combination and conspiracy in restraint of trade and commerce* by causing the directors of said Washington Company to surrender, by instrument in writing, their offices as directors of the said Washington Company to a board of directors designated, selected and controlled by said Nevada Company." That "in pursuance of said policy *and of said unlawful agreement, combination and conspiracy* and as a result of the control of the Washington Company given and obtained as aforesaid said Nevada Company, with the knowledge and consent of the defendants herein, and each of them took from the said Wash-

ington Company all of its assets and dissipated, wasted and diverted the same." (Trans. pp. 35, 36. Italics are ours.)

The pleader evidently was actuated by the desire to connect and tie every step in the series of transactions complained of to the original combination and conspiracy which was set forth in paragraph X of the complaint, and therein alleged to have continued and persisted until the end. Every step is with great care alleged to have been in pursuance of and a part of the original conspiracy.

This is further emphasized in paragraph XXIII of the complaint (Trans. p. 41) where the pleader is seeking to avoid the bar of the statute of limitations. It is therein alleged "that at no time prior to March, 1915, did any creditor, depositor or other person interested in the administration of the assets of the said Washington Company have any notice or knowledge of the existence of said combination and conspiracy to restrain trade and commerce as aforesaid." If it is true that the complaint pleads three separate conspiracies, of which one of the three did the pleader hereby intend to deny knowledge?

We submit not only that the complaint shows but one conspiracy, and acts done in pursuance thereof, but that unless the complaint alleges that the acts and things complained of were done pursuant to the conspiracy alleged in paragraph X of the complaint, there is no allegation to show that the injuries complained of were suffered by reason of any violation of the Sherman act. For the complaint contains no allegations of a combination or conspiracy that in any degree tended to restrain trade or commerce, unless they can be found in paragraphs X to XIV of the complaint. To this conspiracy it is conceded that the Washington Bank, as a corporation, was itself a party.

4. The precise question, then, before the court is: Does the Washington Bank have a right of action in its own right for damages which it suffered by becoming a party to a contract in restraint of trade which it entered into by the active consent of all of its officers and all its stockholders?

The Washington Bank has no such cause of action for two reasons:

(*a.*) It was itself a party to the alleged illegal

conspiracy and it was in the carrying out of this conspiracy that the injuries complained of were sustained.

Bishop vs. Am. Preserving Co., 105 Fed. 845.

We have pointed out above that the transactions complained of, under the allegations of the complaint, were carried out in furtherance of the original conspiracy in restraint of trade, to which it is conceded the Washington Bank was itself a party. We have further pointed out that unless the transactions complained of were carried out in pursuance of such original conspiracy in restraint of trade, the damages were not suffered by anything forbidden or declared to be unlawful by the Sherman act, and there would therefore be no right of action under section seven of the Sherman act.

Notwithstanding the plain allegations of the complaint to the contrary, it is contended that the corporation itself was not a party because of some highly metaphysical distinction between the whole body of the stockholders and the corporation itself. The appellant's position on this question is, in brief, that when all of the officers and stockholders are carrying on the corporate business in a certain way that nevertheless the corporation itself is not carrying on its business in that way.

It is quite true that for many reasons of convenience the corporate entity is recognized as something distinct from its stockholders. It is equally true, however, that a corporation outside of and beyond the constituent body of its stockholders is nothing. The corporation is its stockholders working together in unison and for certain purposes by agreement among themselves expressed in its charter and by-laws. This union of its stockholders for definite purposes is the corporate entity. And the distinction between the united body itself and its constituent members is maintained for the purpose of carrying out the purposes of the corporation. And ordinarily the rights of the constituent members of the united body, i. e., the corporation, are worked out by preserving the distinction between the corporate entity and the shareholders because in this way only can the rights of the parties be readily measured and preserved.

Morawetz on Private Corporations, Sec. 227, 2d Ed.

But in the very nature of things the corporation can only act through its officers and stockholders. If they, including the whole body of the stockholders, in the management of the corporate business, act one way, there is no constituent element of the corporate entity left to act in another way.

The shareholders cannot by unanimous action make an unlawful act, lawful. Only the legislature can do that. But they can make it a corporate act.

Morawetz, Private Corporations, sec. 623.

It was most strenuously contended in the district court that the corporation itself was not a party to the illegal conspiracy, but that its stockholders only were parties to that conspiracy. This contention is fully answered by the following cases.

Linn and Lane Timber Co. vs. United States, (9th Circuit) 116 C. C. A. 267, 196 Fed. 593;

State ex rel Watson vs. Standard Oil Co., 49 Ohio St., 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145.

People of New York vs. North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 18 Am. St. Rep. 843, 9 L. R. A. 33.

The case of *State ex rel Watson vs. Standard Oil Co., supra,* was a cause brought against the Standard Oil Company of Ohio charging it amongst other things with having entered into illegal combinations in restraint of trade. The combinations were effected through certain agreements between the whole body of the stockholders and the stockholders of other corporations. The case differed from the case at bar in this: that in the case at bar

the illegal agreements purported to be the agreements of the corporation. In the Ohio case care was taken to avoid making the corporation a party in name. Notwithstanding that fact, however, the Supreme Court of Ohio held that the corporation as such was a party to the illegal transaction. In other respects the essential facts so far as affecting the question here were the same; and the court said:

> "The general proposition that a corporation is to be regarded as a legal entity existing separate and apart from the natural persons comprising it is not disputed, but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by anyone who pretends to accurate knowledge on the subject."

And again:

> "So that the idea that a corporation may be a separate entity in the sense that it can act independently of the natural persons composing it, *or abstain from acting, where it is their will that it shall,* has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, when the question is as to whether a certain act was the act of the corporation or of its stockholders, cannot be decisive of the question, and is therefore illogical; for it may as likely lead to a false as to a true result."

And again:

> "On a question of this kind, the fact must constantly be kept in view that the metaphysical

> entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act."

The case of *People of New York vs. North River Sugar Refining Co., supra,* was a case brought by the State of New York against the Sugar Refining Company to annul its charter because it had become a part of an illegal combination of sugar refineries. The crucial question in the case was whether the corporate entity had sinned or simply its stockholders and officers. It differed from the Ohio case in this: that the illegal agreements purported to be agreements of the corporation itself. In this respect it is like the case at bar. The court said:

> "The combination therefore framed by the deed was a trust; and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argu-

ment, which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own,—are there without corporate action on their part, and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators, as it were to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure."

And again:

"The stockholders, by a unanimous vote, decided to go into the proposed combination, and authorized their committee to agree on the terms. A trust of personal property may be created by parol. That the committee acted, that they contracted for their company upon the terms of the deed, is an inevitable inference from the action of the secretary, who swears that he signed by authority, and could have had none except upon the agreement of the committee. It was therefore actually made, and the official signature was but the evidence of the agreement entered into by them. Here was a deliberate corporate act, if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. At that moment the defendant company had become a party to the contract by the consent of everybody connected with the corporation, and by force of the agreement to that effect which the signature of the

secretary shows had been made by the authorized agency."

And again:

> "If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that would disarm the State in every case of misuse or abuse of chartered powers."

The court concluded that the claim of the state that the acts complained of were corporate acts could "not be defeated by the assumed innocence of a convenient fiction."

(*b.*) To say that the corporation as such has in its right a cause of action against the whole body of its own stockholders for damages arising from the manner in which the whole body of its stockholders has managed its business is to state a moral, legal and physical impossibility.

The reason why the corporation can complain for injuries done to its property and business by a majority only of its shareholders is, that the acts of the majority are in violation of the agreement,

expressed or implied, or both, which creates the united body of stockholders and under which it operates. No majority, no matter how great, has a right to break and violate this agreement and compact. If damage results from such violation, damage is done to the united body and the dissenting minority, however small, obtains its redress through the united body itself. In this way the rights of the parties can most readily be adjusted. But if all the stockholders are parties to the transaction which causes the injury there are no rights to be adjusted.

The authorities cited by the appellants to sustain his position that a corporation has itself, and in its right, a cause of action against all of its stockholders for a mismanagement in which they all concurred, do not sustain his position.

Cases are cited to the effect that a deed signed by shareholders in their individual capacity will not convey title to the corporate real estate. This is doubtless true, but if all of the shareholders of a corporation should join in a deed of corporate lands and should turn the possession over to the grantee who should commit waste, we apprehend that the corporate entity could not maintain a right of action

in tort against all its stockholders for such a transaction.

Even though the deed might not pass title it would support an action for specific performance.

Anderson vs. Wallace Lumber and Manufacturing Co., 30 Wash. 147;

Bundy vs. Iron Co., 38 Ohio St. 301.

We shall not review all the cases cited by the appellant on this point. It is sufficient to say that no one of them (nor any that we have been able to find) holds that the corporation, *as such,* i. e., the corporate entity, has any rights in excess of or in opposition to the rights of all its stockholders.

In the case of *United States vs. Milwaukee Refrigerating Transit Company,* 142 Federal, 247, cited by the appellant, it is said, by Justice Sanborn, on page 255:

> "A corporation from one point of view may be considered an entity without regard to its shareholders, yet the fact remains self-evident that it is not in reality a person or thing distinct from its constituent parts. The word 'corporation' is but a collective name for the members who compose the association." And further:
>
> "It seems that an act of all the stockholders as individuals, binds the corporation, as no one can object."

The same truth is recognized by this court in the case of *Linn and Lane Timber Company vs. United States,* 196 Federal, 493. In the opinion this court quoted with approval the following from *Morawetz on Corporations,* section 227:

> "The statement that a corporation is an artificial person or entity apart from its members is merely a description in figurative language of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact."

See also

Thompson on Corporations, Vol. I, Sec. 10, 2d Ed.

The appellant claims that the case of *Pennsylvania Sugar Refining Company vs. American Sugar Refining Company,* 166 Fed. 254, sustains this action. In that case the Pennsylvania Sugar Refining Company sued the American Sugar Refining Company for damages which the former suffered at the hands of the latter in violation of the Sherman act. It was not a case where the plaintiff was attempting to sue all of its stockholders for damages which it claimed to have suffered by reason of the act of all its stockholders.

Nor does the case of *Hays vs. Kenyon,* 7 R. I. 136, sustain his contention.

In that case the defendant, president of a bank, sold his stock to "worthless adventurers and took payment not from them but by carrying off and appropriating to his own use all the valuable assets of the bank." This was fraudulent as to creditors and the court properly held that the receiver could, as representing creditors, consider the transfer of the corporate property as void as to creditors and charge him with the value. There is nothing in the case that distinguishes it in principle from any other action by a receiver to avoid a fraudulent conversion by directors of the corporate assets.

The appellant claims that the idea of the distinct legal entity of a corporation will not be disregarded except when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime. Courts have said that the distinction will never be maintained when to do so would defeat public convenience, justify wrong, protect fraud or defend crime; but none of them have said, so far as we have been able to discover, that it would in all other cases be recognized. What they have said, and what is the only rule that comports with the obvious truth, is that they will recognize the fact that the corporation has no rights

beyond or antagonistic to the whole body of its constituent members.

However, it would be a gross wrong to permit a corporation, by its receiver, to recover from its stockholders treble damages for corporate management that all the stockholders consented to. It is difficult to conceive how any greater misuse of the fiction could be made.

The fact that there may be creditors who will share in the recovery does not alter the situation in the least. For, if the corporation, *in its own right* (and this is the appellant's contention) has a right of action at all, it would have it with or without creditors. The right of the receiver to maintain this action in the right of the corporation does not depend upon the existence of creditors.

It is perhaps not strange that we have been unable to find many cases where the court has been called upon to consider the question of the right of a corporation to maintain an action in its own right against all its stockholders for injuries done by them to its property. The question was, however, considered in the case of *Hayes vs. Parsons,* 14 Abbott N. C. (N. Y.) 419. In that case Sedgwick, Ch. J., said:

"Again, considering that the fundamental position is, that Catlow became, in fact, shareholder to the amount of all the capital stock, the following was the relation between the parties; the corporation was the holder of the legal title of the property of the corporation, subject to corporate uses. Excepting this legal title for corporate uses, the shareholders were the parties interested in the property, in fact, owning all of it, excepting the legal title, which, as against them, could be used for corporate purposes. The trustees were the statutory corporation. The shareholders were members or a part of the corporation. The corporation held the legal title for the pecuniary benefit of the shareholders having no beneficial or pecuniary benefit in it.

"On the claims for the plaintiff, the thing possessed is the right of the corporation to have an action against its trustees for damages for their acts, which it is claimed were wrongful to the corporation. This right, if it existed, was held by the same tenure and for the same purposes that other property would be held. The corporation would have a bare title to it for the beneficial use of shareholders. It seems to be evident, that the corporation could not claim as damage to its interest what would be damage to the beneficial interest, when the owners of the latter had consented to the so-called injury.

"In fact, however, the case is a little different in point of circumstance, although not essentially. The beneficial owner or shareholder having in advance of the occurrence, which but for their participation would have created a cause of action in the corporation,

promoted it and then participated in it, the conduct of the trustees never made a cause of action because that conduct was not wrongful as respects the shareholders. The principles that have now been used are established by *Scott vs. Depeyster* (1 Edw. Ch. 513); *Hotel Co. vs. Wade* (97 U. S. 13); *Kent vs. Quicksilver Mining Co.* (78 N. Y. 159). It is not necessary to give the reasoning of these cases; they are applicable here. It is supposed that in the last case there is a difference, in that acquiescence of shareholders was held to estop them in favor of innocent third parties. But it must be considered that after the power to ratify or acquiesce is held to exist, the same principle would act in favor of third parties although not innocent, against whom damages for the act ratified were claimed.

"It seems to be clear that Catlow could not maintain an action like this, first, because he could not claim that the corporation should bring an action for his benefit on account of a transaction which he took part in, and second, *because the corporation would have no cause of action or right to damages.*"

The question arose also before the Supreme Court of Colorado in the case of *Arkansas River Land, etc., Co. et al. vs. Farmers Loan & Trust Co., et al.*, 13 Colo. 587, 22 Pac. 954. It was attempted in that case to assert the right of the corporate entity to avoid a fraudulent transaction assented to by all its stockholders and affecting the corporate property. The court said:

"The questions presented for consideration are certainly novel in their character. It may well be doubted whether a body corporate, or the shareholders of a corporation, ever presented a parallel case to a court of law or equity. Upon the oral argument it was practically conceded that the individual plaintiffs were not entitled to relief. Nevertheless it was contended that the corporation itself was entitled to consideration, because, being but a legal entity, and having no existence except in legal contemplation, it was incapable of participation in the illegal and fraudulent transactions detailed in the bill and established by the evidence. This contention affords one of the most extraordinary instances of an attempt to separate the body corporate from its constituency which has arisen in the history of corporate litigation. That it cannot be sustained is clear upon principles so long established as to be elementary. Plaintiffs in error are confronted with these principles at the very threshold of their case.

"From the conceded facts it appears that, at the time the contract was made and executed, the issuance of the bonds, and the execution of the trust-deed to secure the same, authorized, and all the capital stock distributed, the parties participating in these transactions were the entire constituency of the corporation. There was no dissenting voice. The corporation itself, therefore, was not only involved in, but must be deemed to have assented to, all these transactions."

5. Inasmuch as it is conceded that the plaintiff here is suing in the right of the corporation and not in the right of creditors it is unnecessary to dwell long upon the rights of the creditors. However, the question may be suggested whether the receiver would have the right to maintain this action in the right of creditors, even though the corporation itself could not maintain it. This question may be readily disposed of. As we have suggested above, this action must be sustained if at all as an action under section seven of the Sherman act. A receiver of an insolvent corporation often does have the right to bring actions which the corporation itself could not bring, but they are always and without exception, actions which the creditors themselves could bring or which are by special statute vested in the receiver for the creditors and which he is required or allowed to bring in their stead for convenience. There is never a right of action in the receiver on behalf of creditors otherwise.

It must be, and as we understand it, is conceded that the injury done to the "business or property" of a corporation is not such a direct injury to one of its creditors as to give that creditor a right of action for damages under section seven of the Sherman act.

See appellant's brief, pp. 10, 20, 59, 61, 125, 127, 138.

Loeb vs. Eastman Kodak Co., 183 Fed. at page 709.

If the creditor himself has no right of action the receiver has none in the right of such creditor.

The correct rule is stated by Judge Comstock in the case of *Curtis vs. Leavitt,* 15 New York, p. 44:

> "The appellant, as receiver, has no interest in or power over the property affected by the trusts in question, except such as he derives under the statutes which have been mentioned. It has been said in this, as in other cases, that he represents the creditors and the stockholders, but for all the purposes of inquiry into his title, he really represents the corporation. He is by law vested with the estate of the corporate body, and takes his title under and through it. It is true, indeed, that he is declared to be a trustee for creditors and stockholders; but this only proves that they are the beneficiaries of the fund in his hands, without indicating the sources of his title or the extent of his powers. If, then, in a controversy between the receiver and third parties, in respect to the corporate estate, it is possible to form a conception of rights, legal or equitable, belonging to the shareholders as individuals, which the corporation itself could not assert in its own name, the receiver does not represent those rights. So far as shareholders are concerned, he can litigate respecting the fund upon precisely the grounds which would be available to the corporation, if it were still in existence,

> solvent, and no receivership had been constituted. In regard to creditors, I should certainly incline to take the same view of his rights and powers under the statutes referred to. It has, however, been uniformly assumed, and was not denied on the argument, that he succeeds to the rights of creditors, *and takes his title under them,* where conveyances have been made in fraud of their rights, but otherwise valid."

Moreover, if there were any right of action in the creditors for direct injury to their property or business under section seven of the Sherman act, it would be an action in tort *against* the corporation and not an action to reach corporate assets conveyed in fraud of their rights. It, therefore, would not pass to the receiver.

B.

The Action Was Not Commenced Within the Time Limited by Law.

Paragraphs XXI to XXIII of the complaint contain the allegations by which the appellant seeks to avoid the Statute of Limitations. (Trans. pp. 37 to 40.) In these paragraphs it is alleged that there was deception practiced upon, concealment from, and lack of notice, and knowledge by, the creditors and depositors of the Washington Bank, and by the receivers of the Nevada Bank (consolidated bank)

appointed by the Alaska court, which receivers had taken possession of and administered upon, as a part of the assets of said consolidated bank, the assets which it had acquired from the Washington bank.

It is now conceded by the appellant that all these allegations are immaterial. He now bases his claim that the Statute of Limitations has not run upon the propositions:

(a) That this action is brought in the right of the corporation, the Washington bank, and not in the right of the creditors; and therefore knowledge or lack of knowledge on the part of the creditors and depositors is immaterial.

(b) That the knowledge or notice that will start the Statute of Limitations running must be knowledge or notice of the corporation itself.

(c) That there was no knowledge or notice on the part of the corporation *as such,* because it had no capacity to receive notice or knowledge, and no power to sue.

(d) That it had no such capacity to receive knowledge or notice, and had no power to sue be-

cause of the fact that all its officers and all its stockholders had participated in the fraudulent acts.

(e) That not until appellant was appointed receiver of the Washington bank in May, 1915, did the corporate entity, as distinguished from the whole body of its officers and stockholders, have a representative who could receive knowledge and notice on its behalf.

The appellant on this branch of the question is confronted with the same difficulty as in his attempt to show a cause of action. If it were true that there is a substantial, real right in the corporate entity in excess of and hostile to the rights of the whole body of its stockholders, then it would follow that the corporate entity must be able in some manner to take notice and have knowledge of such rights, and of the infringement thereof.

With respect to the disability to sue, it is plain that this disability arose from the fact, and that fact only, that all its stockholders had consented to what had been done, and that consequently the corporate entity, which is but the association of these stockholders, had no right to sue. The corporation had a full complement of officers and stockholders. It was not incapacitated from

suing. The only difficulty was that none of the persons constituting the corporation had been injured. The inability of the corporate entity to sue arose from a lack of right, and not from a lack of power.

With reference to the lack of notice to the corporate entity it is sufficient to say that it is a legal and physical impossibility that knowledge and notice to all of the officers and all of the stockholders of a corporation shall not under any and all circumstances be knowledge and notice to the corporation. This for the simple reason that there cannot possibly be anything more in the corporate entity to whom knowledge or notice could be given or imputed. Appellant's position in this regard rests upon the wholly untenable proposition upon which his whole case is based; i. e., that when there has been abstracted from the corporate entity all its stockholders and all its officers and all their rights, there are still some rights left.

The appointment of the appellant as receiver of the Washington bank did not alter the situation in the least. It is claimed by the appellant that he by such appointment became the representative of the corporation, and that it thereby was through him first clothed with the capacity to receive knowl-

edge and notice. In general, the receiver represents the corporation, its substance, its constituent members. But what does the receiver represent when he attempts to assert this cause of action? He claims that he represents the corporate entity alone, stripped of all its substance. He admits that he cannot assert this cause of action in the right of creditors. In this he is correct. Therefore, his right to sue does not depend upon the existence or non-existence of creditors. If the corporate entity as such has a right of action it would have had it if there were no creditors. In such a case we would be presented with the strange anomaly of the corporate entity suing its own stockholders for mismanagement of corporate affairs to which they all consented, and the damages recovered would be for the benefit of the same persons who would have to pay the judgment. How, then, can it be claimed that the receiver for the purpose of asserting this cause of action is the representative of anything or anybody?

It is, perhaps, not necessary to pursue the discussion further, but we beg to submit the following:

We concede the statute of limitations of the State of Washington governs.

The lower court correctly held that this case fell within subdivision six of section 159, Remington & Ballinger's Code of Washington, limiting to three years,

> "An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different penalty (limitations)."

Counsel argue that this is erroneous because actions of this sort are not penal, and cite *Chattanooga Foundry Co. vs. Atlanta*, 203 U. S. 390, and kindred cases in support of their position. They lose sight of the fact that the recovery of treble damages under the seventh section of the Sherman Act is granted as a remedy for a private wrong and is compensatory in its purpose and effect, and that the section quoted is manifestly directed to the collection of a statutory compensation and not to the imposition of a penalty upon the wrong doer; else why the clause, *"where an action is given to the party aggrieved?"* The precise point was presented and unanswerably decided in *Harvey vs. Booth Fisheries Co.*, 228 Fed. 782.

Appellant contends that this suit is controlled by subdivision 4 of section 159, Remington & Ballinger's Code, limiting actions for relief upon the

ground of fraud to three years after discovery by the aggrieved party of the facts constituting fraud. Even if this subdivision does apply it will not help the appellant.

Before addressing ourselves to this proposition we wish to call attention to the settled policy of the State of Washington upon the statute of limitations.

> "These statutes announce a public policy. It is believed that it is better for the public that some rights be lost than that stale litigation be permitted. It follows, therefore, that, when the limitation of the liability fixed by the statute is doubtful or debatable, it should be so construed as not to contravene that policy."
>
> *Thomas vs. Richter,* 88 Wash. 451-456, 153 Pac. 333-336.

Where, as here, the receiver is suing in the right of the corporation, the statute runs against the receiver when it has run against the corporation.

> *Hawking vs. Donnerberg,* 66 Pac. 691.
>
> *Chilberg vs. Siebenbaum,* 41 Wash. 663.

The answer to appellant's proposition is that no fraud other than that upon which the action is predicated is even suggested in the complaint. Had there been some independent act which precluded the institution of an action to redress the

primary fraud there might be something in his position. He fails, however, to distinguish between that fraud which gives birth to a cause of action and that fraud which prevents a suit thereupon.

There is no denial that the facts were there and visible to all who wished to see. The legal effect thereof is the only thing which seems to have been undiscovered.

It is elementary that mere failure to discover a cause of action is not enough to toll the statute, but a party seeking its extension must aver and show that he used due diligence in his own behalf and has not slept upon his rights. But in this case no excusatory facts are pleaded. To the contrary the complaint is replete with allegations which show that the plaintiff and everyone connected with the institution have been in possession of facts which would put an ordinarily prudent person upon inquiry, and which, if followed up, would necessarily have disclosed the very points upon which this suit is predicated. As put by Judge Neterer in his opinion in the court below:

> "The allegations of the complaint to avoid the bar were not the want of knowledge of the facts but rather want of legal information upon the facts."

The appellant's claim that no one in Alaska could be charged with the knowledge of the laws of Nevada or of Washington is of no force. This is a Washington corporation which is suing and it is certainly charged with knowledge of the Washington law. It dealt with the Nevada corporation and was equally charged with the knowledge of its powers. Furthermore, a sale of shares to the Nevada bank and a consolidation, even if contrary to the Nevada law, would not constitute a violation of the Sherman Act, for which alone this action could lie. It is the violation of the Federal law, and that alone that must give life to the plaintiff's action. Consequently ignorance of the Nevada law is wholly immaterial. And if there was any fraudulent intent it was so by reason of the general law which obtains in Alaska as elsewhere.

There is no charge that the defendants or any of them made any active or even passive effort to prevent the timely appointment of a receiver of the Washington Bank or that they did anything directly or indirectly which prevented the institution and maintenance of a suit against them.

The point is made that even after his appointment by the Alaska courts the plaintiff as such receiver could not have maintained this suit in the

State of Washington. There is, however, no contention made that the defendants or any of them obstructed the appointment of an ancillary receiver or did anything else towards preventing the timely commencement of this action.

Conceding that concealment by a defendant of a cause of action against him upon the ground of fraud will operate to suspend the statute of limitations until discovered, we submit that there was no such concealment here, but, to the contrary, no facts excusing or tending to excuse the failure to discover plaintiff's cause of action, if any, are pleaded. A perusal of the complaint will, we believe, fail to disclose any allegations which make it appear that the fraud could not have been discovered immediately upon the exercise of ordinary diligence, and for that reason the action is barred. The most recent case which we have found upon a statute similar to ours is *Montgomery vs. Peterson,* decided June 17, 1915. It was there said:

> "Subdivision 4 of Section 338, Code of Civil Procedure, provides that in the case of fraud or mistake the action must be commenced within three years after the discovery by the aggrieved party of the facts constituting fraud or mistake. Under the cases in this state it is not enough to assert that the discovery was not sooner made. It must appear that it could not have been made by the exercise

of reasonable diligence; and all that reasonable diligence would have disclosed plaintiff is presumed to have known, means of knowledge in such a case being the equivalent of the knowledge which it would have produced. *Truett vs. Onderdonk,* 120 Cal. 581, 53 Pac. 26; *Lady Washington Co. vs. Wood,* 113 Cal. 482, 486, 45 Pac. 809; *Del Campo vs. Camarillo,* 154 Cal. 647, 98 Pac. 1049. See also, *Wood vs. Carpenter,* 101 U. S. 135, 140, 25 L. Ed. 807."

Montgomery vs. Peterson, 151 Pac. 24 (Cal.).

As said by the Supreme Court of the State of Washington:

"Construing this section, this court has held in a number of cases that whatever is notice enough to excite attention and put a party upon his guard, or call for an inquiry, is notice of everything to which such inquiry might have led. 'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it. A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a discovery, is in law equivalent to discovery,—equivalent to knowledge.' *Deering vs. Holcomb,* 26 Wash. 588."

McDonald vs. McDougall, 86 Wash. 339-342.

Irwin vs. Holbrook, 32 Wash. 349.

Uhlbright vs. Mulcahey, 78 Wash. 9.

Garbutt Lbr. Co. vs. Walker, 64 S. E. 698 (Ga.).

Little vs. Reynolds, 28 S. E. 919 (Ga.).

Boom vs. Boom, 85 S. W. 48-51 (Tex.).

Scott vs Boswell, 118 S. W. 521 (Mo.).

Shelby vs. Brogy, 36 S. W. 602 (Mo.).

Provident Life vs. Withers, 116 S. W. 350 (Ky.).

Gordon vs. Rhodes, 117 S. W. 1023-1027 (Tex.).

Howell vs. Bork, 158 S. W. 574 (Tex.).

Kinder vs. Scharff, 55 So. 769 (La.).

Van Ingen vs. Duffin, 48 So. 507 (Ala.).

Brockett vs. Perry, 87 N. E. 904-4.

"The fact that a person entitled to an action has no knowledge of his right to sue, or the fact out of which his right arises, does not prevent the running of the statute or postpone the commencement of the period of limitation until he discovers the facts or learns his right thereunder. Nor does the mere silence of the person liable to the action prevent the running of the statute. To have such effect there must be something done to prevent discovery. Something which can be said to amount to concealment."

State vs. Walters, 66 N. E. 182.

The argumentative allegations contained in paragraph XXIII are more in the nature of conclusions of law than of averments of fact.

Edwards vs. Smith, 29 S. E. 129.

There is absolutely no excuse for the delay,

nor is a sufficient one alleged in the complaint.

Jones vs. Woodward, 151 Pac. 587.

The complaint abounds with allegations of fact and circumstances existing and apparent, which if followed up would have developed the ultimate facts upon which this suit is based. These though coupled with a positive denial of the discovery of fraud are enough to start the statute and render the complaint demurrable.

Wood vs. Carpenter, 101 U. S. 135.

Tucker vs. Weatherbee, 82 S. E. 638-640.

Griffin vs. Seattle Consolidated Ry. Co., 36 Wash. 627.

Uhlbright vs. Mulcahey, 78 Wash. 91.

In the court below the defendants laid considerable stress upon the case of *Sterns vs. Hochbrunn,* 24 Wash. 206, in which it was held that a complaint is sufficient as against demurrer when it contains a direct and positive statement of the time of the discovery of the fraud without further negativing the idea that the fraud might have been discovered sooner; but in that case the complaint contained no allegations of fact which would excite suspicion or tend to place the plaintiff upon inquiry. Nor were there any facts charged which were inconsistent with the bare allegation of failure to discover.

In the later case of *Griffin vs. Seattle Consolidated Ry. Co.,* 36 Wash. 627, *supra,* the *Hochbrunn* case was distinguished upon these grounds, and the court said, at page 634:

> "In the case cited (*Stearns vs. Hochbrunn*) there was a direct and positive averment as to the time of discovery, and it does not appear that there were any other statements in the complaint inconsistent with such averments."
>
> *Griffin vs. Seattle Consolidated Ry. Co.,* 36 Wash. 627.

From this it follows that when the complaint shows facts which would excite inquiry by an ordinary man, the pleading must do more than merely negative discovery. It must show circumstances which excuse and allege facts from which the court can deside whether the plaintiff was sufficiently diligent in acquainting himself with the particulars at his command. The means of knowledge are its equivalent. The statute does not distinguish between actual and constructive knowledge, and the latter is sufficient to start the limitation. If this is so, the demurrer was properly sustained and the complaint clearly shows facts which constitute constructive knowledge, thereby bringing the case within the statute.

> "The only allegation as to when the plaintiff learned of the frauds complained of is

that 'plaintiff did not know nor have notice of or have the means of knowing or discovering said acts of fraud hereinbefore specifically alleged until within three years next before the commencement of this action.' Such general allegation is insufficient to take an action for relief on the ground of fraud, occurring more than tree years before the commencement of the action, out of the bar of the statute. *People vs. San Joaquin Valley Agr. Assn.,* 151 Cal. 797, 91 Pac. 740; *Truett vs. Onderdonk,* 120 Cal. 589, 53 Pac. 26; *Lady Washington Co. vs. Wood,* 113 Cal. 486, 45 Pac. 809; *Lant vs. Manley* (C. C.) 71 Fed. 7. 'He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret, or were kept concealed; and he must also show the times and circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged.' *Lady Washington Co. vs. Wood, supra; People vs. San Joaquin Valley Agr. Assn., supra.*"

Denike vs. Santa Clara Valley Agr. Society, et al., 98 Pac. 687-688 (Cal.).

"The language employed in the statute, 'until discovery of the fraud,' does not mean until the party complaining had actual knowledge of the fraud alleged to have been committed, but that constructive notice of the fraud is sufficient to set the statute in motion, even though there is no actual notice; that where the means of discovery lie in public records required by law to be kept, involving

the very transaction in hand ,and the interets of the parties to the litigation, the public records themselves are sufficient notice of the fraud to set the statute in motion.' *Black vs. Black,* 64 Kan. 689, 704, 68 Pac. 662, 666. 'Constructive discovery resulting merely from a statute, under such circumstances that the aggrieved person, although actually diligent, had no reasonable opportunity to learn of the facts constituting the fraud, may not be sufficient to set the statute in operation, but constructive discovery resulting from his failure to be diligent when diligence would have disclosed the fraud practiced upon him will always do so.' *Donaldson vs. Jacobitz,* 67 Kan. 244, 247, 72 Pac. 846-847."

Duphorne vs. Moore, 107 Pac. 791-792 (Kan.).

Jackson vs. Jackson, 47 N. E. 963.

"He should have alleged that he was in fact diligent to the extent of the efforts made by him to discover the fraud alleged."

Edwards vs. Smith, 29 S. E. 129.

"The rule of pleading, as indicated by the authorities, where one seeks to avoid the bar of the statute on the ground of fraud, is that he must allege the facts upon which he relies, so the court may determine from the pleadings whether he is entitled to the relief sought; assuming, as must be done on demurrer, such allegations to be true. *If, as has been well said, it appears from the complainant's own allegations that the means were at hand to readily discover the fraud complained of,* and such means of information would have been used by a person of ordinary care and prudence in the transac-

> tion of his own business, then he will be held to have had notice of everything which a proper use of such means would have disclosed; and failure to avail himself of such means or avenues of information appearing, the issue presented is one of law for the decision of the court and not a question of fact for the determination of the jury."
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> *Boren vs. Boren,* 85 S. W. 51 (Tex.).

A large part of appellant's argument is based upon the proposition that where there is a fraud which prevents a person from maintaining an action against another the equitable rule of estoppel will apply. He fails to distinguish between that fraud which gives rise to the cause of action and one which prevents the institution of a suit to redress the wrong. On the other hand, there is not a single word which shows or tends to show that any acts fraudulent or otherwise were committed which prevented the obtaining of any redress by anybody entitled thereto. And here lies the distinction which counsel overlook. The fraud described is the gist of the action. The statute of limitations began to run from the time when those facts were, or in the exercise of ordinary caution should have been, discovered. This fraud did not bar the running of the statute but was the very basis of the suit. On the other hand, had there

been any independent fraud which prevented an action to redress the first fraudulent acts then an estoppel would have ben created.

The sum of appellant's argument seems to be that had no receiver ever been appointed the statute of limitations would have never run against this action. The proposition is too absurd to require argument.

It is claimed in the appellant's brief, and it may be inferentially in the complaint, that the sale of the shares by the stockholders of the Washington bank to the Nevada bank, and the consolidation of the two banks was forbidden by the laws of Nevada. Whether the laws of Nevada or Washington, in truth, forbid either the sale of stock or the consolidation, is not involved in this appeal. For, if this suit can, under the allegations of the complaint, be maintained at all, it could be maintained no matter whether the Nevada laws or the Washington laws prohibited the sale, if it was made for the fraudulent and unlawful purpose alleged. We make this statement because the appellant has made no attempt to argue in his brief that the Nevada law or the Washington law has any such effect, doubtless taking the same view as

ourselves that the question is not here involved. We make the statement for the further reason that whether there is anything in either the Nevada law or the Washington law prohibiting either the transferring of the shares or the consolidation, is a question that should not be decided by the court without its being fully presented and argued.

It is respectfully submitted that the judgment should be affirmed.

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